Editor's Note: Reconsideration denied by Order issued Aug. 13, 1997.

BETTY L. AND MOSES TENNANT

IBLA 92-437, 92-509 Decided April 16, 1996

Appeals from separate determinations of the Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, not to take further action on two citizen complaints.

Affirmed in part; set aside and remanded in part.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

   Where an appeal is taken from a determination by OSM that no further action will be taken on a citizen's complaint because a State regulatory authority, in response to a 10-day notice, has shown that good cause exists for failing to correct an alleged violation, only such issues as were raised in the original complaint can be considered in the context of adjudicating the appeal.

2. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Subsidence

   An OSM decision on informal review upholding a determination that the state regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint charging damage to improvements from subsidence caused by an underground coal mining operation will be affirmed on appeal where the complainant fails to show the state regulatory authority's action was arbitrary, capricious, or an abuse of discretion.

3. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures:

Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Subsidence

Under the provisions of 30 CFR 817.121(c)(4)(i) (1995), a rebuttable presumption arises that a permittee caused damage to surface structures if damage to any non-commercial building or occupied residential dwelling or structure related thereto occurs as a result of earth movement within an area determined by projecting a specified angle of draw from the outermost boundary of any underground mine workings to the surface of the land. No presumption arises, however, absent an initial showing that damage to surface structures has occurred, which damage was the result of earth movement.

4. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

An OSM decision on informal review upholding a determination that the state regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint that a permittee was responsible for methane dissolved in his water supply will be set aside and the matter remanded for further action where the record indicates that OSM's decision was inconsistent with other OSM determinations finding the permittee liable for methane contamination of appellant's water well.

APPEARANCES: Betty L. Tennant, pro se; Moses Tennant, pro se; Steven C. Barcley, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Betty L. and Moses Tennant have appealed from separate determinations of the Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), not to take further action on two citizen complaints which they filed pursuant to the provisions of section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1988). For reasons set forth below, we affirm in part and set aside and remand in part.

The instant matter commenced on September 11, 1990, when Moses Tennant, son of Betty L. Tennant, contacted the Morgantown, West Virginia, Area Office of OSM with reference to the Federal #1 - Grant Town Mine to complain both about subsidence of his house and the presence of methane in his water well. Insofar as the subsidence issue was concerned, Tennant noted that he had filed an insurance claim for subsidence on July 25, 1990, 1/ and the West Virginia Department of Energy (WVDOE) had investigated the matter through reviewing various maps and had concluded that the subsidence had not been caused by mining, a conclusion with which Tennant did not agree. With respect to the presence of methane in his water supply, Tennant noted that Eastern Associated Coal Corporation (EACC) had drilled a new well in 1988 to replace another well which had gone dry and that tests conducted by EACC had shown high levels of methane present in the new well. He informed the Morgantown Office that he had already contacted the Federal Mine Safety and Health Administration (MSHA) to request that someone sample his water. Tennant was advised by the Morgantown Office to contact them if the inspector did not show up.

In a letter to the Morgantown Area Office, dated September 13, 1990, Tennant expanded upon his concerns. According to Tennant, in 1984, Peabody Coal Company (which was, apparently, subsequently acquired by EACC) had drilled four new water wells and redrilled another well to a deeper depth in his general vicinity to rectify damage caused by longwall mining of the Pittsburgh seam. This redrilled well was located 100 feet from his house and his own wells. In 1988, when two of his wells went dry he contacted Peabody which drilled a deeper well. However, subsequent laboratory tests conducted on three different occasions by the West Virginia Department of Health had found that the water was unsafe because of the presence of coliform organisms. He also noted that methane gas was escaping from all three of his water wells. Tennant asserted that, while EACC had replaced the quantity of water lost, it had not replaced the quality of the water which had been lost. Tennant also objected to the fact that while he had lost two wells, EACC had only drilled one new well.

Tennant also noted that he disagreed with an Investigative Report which he had received from WVDOE, pursuant to a complaint which he had filed on August 31, 1990, that had concluded that his methane problem was more likely the result of a leak from a nearby abandoned gas well rather than mine subsidence. Tennant also recounted a conversation which he had had with a geologist employed by the West Virginia Geological and Economic Survey Office in which the geologist stated that there was no 100-percent method of determining whether or not mine subsidence was responsible for

---

1/ While the claim was filed in July 1990, the date of loss for which the claim was made was Dec. 15, 1988. We note that Tennant ultimately received $7,793.22 in payment for this claim on Nov. 2, 1990.

the cracking of his garage's foundation and other damage at his house. Tennant essentially argued that, since there was no way of saying that this damage was not caused by mine subsidence, EACC should be held liable.

Pursuant to the foregoing, OSM issued ten-day notice (TDN) 90-11-017-011 to WVDOE on September 18, 1990. On September 24, 1990, OSM received WVDOE's response to the TDN. This response noted that an investigation had already been undertaken of Tennant's complaint. The attached report, prepared by WVDOE geologist Jo Ann Erwin, concluded that (1) while all three wells on the Tennant property emitted detectable levels of methane, this was not unusual in the area; (2) insofar as coliform bacteria contamination of the water well was concerned, it was more likely related to the location of the Tennant home and well on the stream flood plain (which was underlain by unconsolidated alluvial sediments) and the lack of sewage treatment facilities upstream, rather than occasioned by subsidence; and (3) the damage to Tennant's concrete block outbuilding 2/ was more likely due to the differential settling of the building on the unconsolidated alluvial sediments rather than being the result of mine subsidence.

Upon receipt of the WVDOE response, OSM proceeded to evaluate the matter. In the course of this evaluation, an OSM program specialist took samples of the water from the wells and inside Tennant's house in an attempt to determine both the existence and the possible source of any methane in the water. On January 9, 1991, OSM informed WVDOE that, in its view, appropriate action had been taken on the TDN based on OSM's conclusion that the violation did not exist at the time of the State inspection. However, we note that the attached narrative, while generally not disputing WVDOE's assertion that the presence of coliform bacteria was not the liability of EACC and that the subsidence of the outbuilding was likely caused by settling on unconsolidated sediments, expressly noted that the possibility did exist that the ground movement was caused by mine subsidence and further noted that "OSM determined the permittee [EACC] is responsible for the methane problem at the complainant's wells."

These conclusions were reiterated in a letter of the same date sent to Tennant. In this letter, OSM explained that the absence of written data with respect to the quantity and quality of the water produced from Tennant's wells prior to the drilling of the new well in 1989 made it impossible to assign responsibility for the coliform bacteria problem to EACC. With reference to the methane problem, OSM noted that it had detected the presence of methane levels ranging from 0.1 percent to 3.4 percent inside the old and the new well casings during two visits in late 1990, though no methane was detected either in Tennant's kitchen or the crawl space underneath his house during these visits. OSM concluded that "the methane is most likely emanating from the Federal #1 mine

---

2/ The record indicates that this outbuilding is a tool shed approximately 8 x 8 feet x 7 feet high. See Report by William C. Morrison, dated
Feb. 13, 1992, at 4.

works and [EACC] is responsible for the safe venting of this gas away from your residence" (Letter of Jan. 9, 1991, at 1). Finally, with respect to the subsidence claims which Tennant had made, OSM concluded that, in the absence of a detailed geotechnical investigation involving drilling, it was impossible to determine whether the alleged subsidence was caused by differential settling of unconsolidated alluvium deposits or mine subsidence. Tennant was informed of his right to seek an informal review of this decision if he was unsatisfied with it. By separate letter of the same date, EACC was informed of OSM's determination with respect to its responsibility to vent the methane detected in the wells away from the vicinity of the Tennant residence. OSM requested that EACC notify OSM of its abatement plans prior to implementation.

On February 22, 1991, having been contacted by Tennant with respect to the continued presence of methane in his and his mother's well and having heard nothing from EACC, OSM contacted EACC, apprised it of Tennant's most recent submission, and requested a response to its January 9, 1991, letter. By letter dated February 26, 1991, EACC responded to the January 9 directive. EACC explained that, during December 1990, it had drilled an 8-inch borehole on the property of Orville Bell, a neighbor of Tennant, for the purpose of determining the source of methane gas detected in Bell's well. EACC related that, near a depth of 139 feet, a methane gas pocket was encountered which flowed at the rate 1,500 cfm of methane. EACC asserted that the gas present in Bell's well, as well as in other wells in the area, dissipated after the interception of the gas at the 139-foot level.

EACC pointed out that this methane was located above the Sewickley seam and approximately 360 feet above the Pittsburgh seam, where its mining had occurred. EACC noted that its borehole was subsequently drilled through the Sewickley and into the Pittsburgh seam, at which point the flow rate for methane declined to 50 cfm. While EACC declared that it had installed a flame proof tube and intended to install a flame arrester and valving on the borehole in the future, EACC asserted that its drilling showed that it was not responsible for the methane found in the wells in the area since the methane originated well above the Pittsburgh seam.

On March 1, 1991, OSM informed Tennant that EACC intended to reopen an old plugged well located above his property with the expectation that this would relieve pressure on his well. Tennant responded to OSM that he would forbear from any further action as long as EACC was working on the problem.

On April 9, 1991, an OSM reclamation specialist checked the methane levels at Moses Tennant and Betty Tennant's properties. The methane levels at Moses Tennant's wells ranged from 0.1 percent to 0.2 percent and inside his house was 0.2 percent. The methane levels at Betty Tennant's well ranged from 3 to 8.5 percent and inside her house they ranged from 0.2 percent to 0.3 percent. On June 26, 1991, Moses Tennant complained that the methane level in his well was 6 to 7 percent, and in the middle of August 1991, he sent a letter of complaint to the OSM Washington Office addressing what he perceived to be a lack of action with respect to his complaints.

On August 30, 1991, WVDOE issued an NOV because of methane gas found in Betty Tennant's wells. In a conversation with the Morgantown Area Manager on August 29, 1991, representatives of EACC informed OSM that while they intended to put a bleeder on Betty Tennant's well, they would not vent Moses Tennant's well since they did not believe they were responsible for the gas detected at that source. EACC was again advised that it was OSM's position (as originally stated in its January 9 letter) that EACC was responsible for the methane found in Moses Tennant's well.

In the ensuing months, OSM continued to investigate the methane problem found at both Moses and Betty Tennant's properties, as well as the allegation that mine subsidence was responsible for damage to Moses Tennant's house. On November 13, 1991, the Charleston Field Office, OSM, requested technical assistance from the Eastern Support Center to determine whether and the extent to which methane was present in the water system and whether any additional actions were warranted in the matter.

By letter dated November 21, 1991, the Morgantown Area Office informed Tennant that it was continuing to investigate the possibility that methane might infiltrate his home through the well pump system. However, this letter also noted that, with respect to OSM's finding that EACC was responsible for venting the methane at the well casing, "[i]t is our understanding that [the West Virginia Division of Environmental Protection (WVDEP)] verified the presence of methane at your new well and was prepared to require Eastern to vent the well head * * * [H]owever, you declined to have the remedial work completed." It advised Tennant to contact WVDEP should he change his mind and decide to have his well head vented. Finally, with respect to the presence of coliform bacteria in the new well, OSM noted that it had sampled the water supply at the kitchen tap twice over the last year and both times the water tested "acceptable" under the EPA criteria.

On December 30, 1991, W. C. Ehler, a staff geologist with the Eastern Support Center submitted his report on his investigation of the presence of methane at Moses and Betty Tennant's houses and wells. The report recited the fact that both of their wells had make-shift vents which were not securely attached and were, in any event, too small in diameter to be effective in venting the methane being produced. 3/ Based on sampling, the report concluded that the methane levels in both Moses Tennant's and Betty Tennant's wells exceeded the lower explosive limit (LEL) of 5-percent methane (Report at 3).

While noting that the ambient gas concentration of methane in the two homes would have to be 500 to 1,000 times greater to approach a hazardous level, the report did express concern that the considerable amount

---

3/ The Report also noted that while the source of the methane could not be determined through the investigation conducted, the high levels of heavy hydrocarbons collected in Betty Tennant's well would support a supposition that the source of the combustible gases was a nearby gas well. Id.

of methane gas which was dissolved in the well water could pose a threat of aeration of dangerous levels of methane, particularly in an enclosed environment such as a dishwasher or clothes washer. The report noted that "[a]n aeration system to treat the well water would reduce or cease the methane problem in the home." Id.

Coincident with the investigation of the methane problem at Moses Tennant's property, William C. Morrison, a civil engineer attached to the Eastern Support Center, conducted an investigation of Moses Tennant's subsidence complaint and submitted a report dated February 13, 1992. This report included a detailed recitation of the conditions which Morrison found to be existing at the time of his examination. Morrison concluded:

> For the most part, Mr. Tennant's house is well constructed and built within the parameters of good construction practices. It shows no apparent structural damage, nor does it exhibit signs of stress, that would have occurred if subsidence had occurred. The slight leaning to the south of the east-west wall appears to have occurred during the construction of the house.
>
> The outbuilding shows obvious signs of damage. These problems are most likely attributable to poor construction: i.e., lack of storm water management combined with shallow and inadequate footers.

(Report at 4).

By letter dated March 13, 1992, the Director of the Charleston Field Office recounted the above findings. With respect to the problems relating to methane, the letter noted:

> As a result of this investigation, we recommend that an aeration system be installed to treat the well water before usage to reduce or eliminate the methane. An appropriate vent should also be installed at the well head. [4/]

(Letter dated Mar. 13, 1992, at 1). Insofar as the subsidence issue was concerned, the Director noted that Moses Tennant's "residence showed no apparent structural damage that could be attributed to mine subsidence" (Letter dated Mar. 13, 1992, at 2). The letter further informed Tennant that no additional action would be taken relative to his complaint and advised him of his right to seek informal review of the actions taken under 30 CFR 842.15. On March 18, 1992, Tennant filed a request for formal review with the Assistant Deputy Director, Operations and Technical Services. By letter dated April 2, 1992, Tennant was informed that the

---

4/ The record indicates that, on Apr. 7, 1992, a vent was installed by EACC at the well head.

determination of the Charleston Field Office that no further action could be taken by OSM with respect to his complaints was affirmed. From this decision, Tennant has appealed to the Board. His appeal is docketed as IBLA 92-509.

While Moses Tennant had frequently alluded to problems of methane contamination which his mother was experiencing, Betty Tennant did not, at that time, file any complaint with OSM. The record, however, indicates that WVDOE issued a notice of violation (NOV) to EACC on July 30, 1991, for "failure to prevent the contamination of an underground water supply, i.e., the Betty Tennant well." EACC was directed to install a vent pipe with a spark arrestor on the well. The record further indicates that this NOV was terminated on August 29, 1991, upon an inspection which disclosed that EACC had installed the required vent and arrestor and had totally abated the violation.

Betty Tennant's first contact with OSM was a letter dated February 21, 1992. In this letter, she asked OSM to investigate subsidence which she asserted was occurring at her trailer, resulting in a growing slide above her residence. She advised OSM that she had already contacted WVDEP concerning this matter but that she was unsatisfied with its response. Subsequent to the receipt of this letter, the Morgantown Office issued a TDN (92-112-017-02) to WVDEP on February 27, 1992, noting that the complainant had alleged that the hillside above her trailer was moving due to mine subsidence. WVDEP responded on February 28, 1992, that it had already investigated the complaint and determined that no violation existed.

The WVDEP investigation had been conducted by Jo Ann Erwin. The report which she submitted noted that the hillside behind the trailer was quite steep (at least a 40-percent slope) and that the vegetation had been cleared along a gas line right-of-way. An incipient landslide was clearly visible at the base of the hill, along the right-of-way, just above Tennant's garage. The report concluded, however, that the evidence showed that the hillside had been creeping for at least 25 years, 5/ while the mining under the area had been conducted only 14 years earlier, in 1977. Thus, the report determined that the evident slippage had not been caused by mining activities.

By letter dated March 20, 1992, Betty Tennant was informed that OSM had determined that the State had shown good cause for not taking any action on her citizen's complaint. The letter further advised Tennant of her right to seek an informal review of this determination if she disagreed with it.

5/ This evidence consisted of the fact that trees growing on the hillside, which were estimated to be between 25 and 30 years old, exhibited a marked bowing at the base of their trunks, a phenomena judged to be typical of trees growing on creeping soils.

On March 23, 1992, Tennant requested informal review of the Morgantown Office's decision. In this submission, in addition to challenging the determination of the Morgantown Office and WVDEP that the hill slippage was not related to mining activities by EACC, she, for the first time, raised the issue of methane contamination of her water well with OSM officials, arguing that it posed a continuing problem.

Insofar as the question of subsidence was concerned, Tennant disputed the assertion that the coal was mined in 1977, arguing that the coal underneath the hill was, in fact, mined in 1969 and earlier. She also submitted part of a report prepared by MSES Environmental & Engineering Consultants, which had apparently been prepared in connection with an insurance claim that she had filed. She noted that the report stated that "due to the proximity to the underground mine and evidences of fracturing related to mine subsidence, it is not possible to completely eliminate mine subsidence as a contributing factor." 6/ She also noted that in a June 11, 1991, WVDOE report dealing with methane in domestic wells, Erwin had specifically adverted to the existence of high levels of methane in Betty Tennant's well and concluded that a causative factor in this problem was mine subsidence:

> It is my opinion that, in this instance, the filling of the Federal No. 1 mine with water is causing some of the remaining pillars to sink into the clay floor causing them to collapse, allowing some areas of the mine to subside. The subsidence is causing fracturing in the overlying strata and the water filling the mine is displacing the naturally present methane gas. The path of least resistance for the gas to travel is up through the subsidence fractures and thence to the well bore for release into the atmosphere.

(Report of June 11, 1991, at 1).

By letter dated April 24, 1992, the Director, Charleston Field Office, affirmed the decision of the Morgantown Area Office not to authorize a Federal inspection or to take further action. Insofar as Tennant's allegations with respect to the presence of methane in her water well was concerned, the Director referenced the investigation report prepared by William Ehler, noting that while it showed the presence of methane in her water well, it could not determine the source of the methane, though there were indications (the presence of ethane) that it might be from a nearby gas well.

6/ However, while the MSES report was unable to completely rule out subsidence as the causative factor in the tilting of Betty Tennant's mobile home, it did find that "[t]he most likely cause of tilting of the mobile home is a differential compaction of the shallow unconsolidated colluvium sediments, or possibly the effects of additional gravitational influence on these sediments," discounting the effects of possible mine subsidence because "[t]he mobile home is not directly above the undermined area, and there were no surface indications of subsidence."

The Director further concluded that, to the extent that Tennant alleged that mining in 1977 had caused the hillside creep, the field investigation conducted by WVDEP established that the hillside had been slipping considerably before the mining occurred. On the other hand, to the extent that Tennant contended that the slippage was caused by mining conducted in 1969, there would be no violation of any provisions of the SMCRA, since SMCRA did not cover mining activities occurring prior to August 3, 1977. However, in view of the fact that the mining activities pre-dating SMCRA might be causing her problems, the Director informed Tennant that he was referring her complaint to the Abandoned Mined Land Division of WVDEP. He concluded, however, that no further action on her complaint would be taken at the present time by OSM. On May 7, 1992, Betty Tennant filed a notice of appeal from this decision. Her appeal is docketed as IBLA 92-437.

[1] As an initial matter, we must note that, though Betty Tennant focusses a considerable amount of her appeal on the methane contamination of her well, this issue is not properly raised in the context of her appeal. Regardless of any unresolved questions relating to the source of the methane contamination, the simple fact of the matter is that she did not raise any issue relating to methane contamination in her February 21, 1992, complaint filed with the Morgantown OSM office, nor did the Morgantown Office communicate such concerns in the TDN which it transmitted to WVDEP, nor did WVDEP address this issue in its response thereto, nor did the Morgantown Office even mention this issue in its March 20, 1992, notification to Tennant that it had determined that the State had shown good cause for its failure to act on her subsidence complaint. As noted above, the issue of methane contamination of her water well was first raised by Betty Tennant before the Director of the Charleston Field Office in her request for informal review of the Morgantown Office's decision.

In our recent decision in Patricia A. Marsh, 133 IBLA 372 (1995), we were faced with a similar situation. In that case, the appellant had originally limited her complaint to OSM to the issue of water replacement but had attempted, in the course of seeking informal review, to expand the issues involved to cover other subsidence damage allegedly occurring. The Board refused to consider such additional claims, basing its refusal on the regulatory structure controlling exercise of the Federal oversight responsibility in States with approved programs. Id. at 375-76.

As the decision in Marsh noted, the complaint filed by a citizen forms the initial basis upon which the Federal enforcement authority commences. Thus, the regulations provide that, as a precondition to the exercise of its oversight authority, a complaint must allege facts which, if true, would constitute a violation of SMCRA. When a citizen's complaint makes such allegations, OSM properly issues a TDN to the State regulatory authority, 7/ both to apprise it of the allegations and afford

---

7/ This presupposes, of course, that there is a State regulatory authority in existence and that OSM is not enforcing the State program under section 504(b) or 521(b) of the Act. See 30 CFR 842.11(b)(1)(ii)(A).

it an opportunity to take action thereon or to explain why it has declined to take such action. The entire structure of enforcement is compromised, however, where an individual files a complaint alleging one set of facts, which allegations are then investigated and responded to and on which basis both the State regulatory authority and OSM determine whether or not to proceed further with enforcement action, only to have a substantially different allegation surface in the course of review of the State's response to the TDN and OSM's subsequent actions thereon. Indeed, permitting such actions would clearly serve to undermine the comity considerations which are at the heart of the TDN process. See Patrick Coal Co. v. OSM, 661 F. Supp. 380, 384 (D. W.Va. 1987). While such allegations might properly serve as an independent basis for seeking issuance of a TDN by OSM, they are not properly addressed in the context of determining the appropriateness of a State response to a TDN issued in reaction to a substantively different set of allegations.

In the instant case, nothing in Betty Tennant's February 21, 1992, complaint can be fairly construed to even suggest that methane in her well was a continuing problem. 8/ Rather, her complaint was clearly limited to alleged subsidence problems occasioned by mining underneath her property and the adjacent hill. Her subsequent attempt to expand this complaint to consider the extent to which methane contamination persists as a problem and EACC has a continuing responsibility to ameliorate it must, in the context of this appeal, be rejected.

[2] Turning to the question properly raised by Betty Tennant in this appeal, viz., EACC's liability for the hillside slippage which imperils her trailer, appellant has simply failed to show error in OSM's decision. Initially, we note that, where OSM has issued a decision on informal review affirming a determination that the state regulatory authority had shown good cause for not taking enforcement action in response to a TDN, an individual challenging such a decision must establish that the state regulatory authority's decision was arbitrary, capricious, or an abuse of discretion. See Ronald Maynard, 130 IBLA 260, 265-66 (1994); Paul F. Kuhn,

_____

8/ Indeed, from WVDEP's point of view, since it had previously issued a NOV to EACC based on the methane contamination, which NOV had been terminated upon abatement of the problem, there would have been no reason, whatsoever, for WVDEP to assume that methane was a continuing problem with respect to Betty Tennant's water well.

We recognize that Moses Tennant did allude to problems with methane contamination in his mother's well. However, a review of his submissions clearly establishes that these references were not intended to serve as a challenge on her behalf but were part of a number of allegations which he made with respect to problems that a number of neighbors were experiencing in an effort to show that EACC's mining activities were the source of his methane contamination.

120 IBLA 1, 16, 98 I.D. 231, 239 (1991). In the instant case, appellant's submissions actually tend to support the determinations of WVDEP that no violation existed.

Thus, the WVDEP investigation had concluded that the slippage which was clearly visible at the base of the hill had been occurring for at least 25 years and, therefore, was not caused by the 1977 mining underneath Tennant's residence. In response to this conclusion, appellant argued that mining under the hill had actually been conducted in 1969 and earlier. The problem with this argument, however, is, as OSM pointed out, that SMCRA does not cover mining activities which occurred prior to August 3, 1977, the date of the adoption of the Act, unless such pre-mined areas are subsequently redisturbed or used in connection with surface mining activities after August 3, 1977. See, e.g., Patrick Coal Co. v. OSM, supra at 384-85; Bernos Coal Co. v. OSM, 97 IBLA 285, 306-307, 94 I.D. 181, 192-93 (1987). Appellant's response, far from establishing error in OSM's determination, actually supports its conclusion that the commencement of the slippage visible on the hillside above her home predated the 1977 date. The deci-sion of OSM with respect to Betty Tennant's citizen complaint is, therefore, affirmed.

We turn now to the questions raised by Moses Tennant's appeal. Unlike the situation with respect to Betty Tennant, Moses Tennant clearly adverted both to methane problems with his water supply and to problems allegedly associated with mine subsidence. But, while both issues are properly raised in the context of his appeal, we do not believe that Moses Tennant has established that the State's refusal to take further action, insofar as his complaint related to assertions of mine subsidence, was arbitrary, capricious, or an abuse of discretion.

[3] Under the recently adopted amendments to the permanent program performance standards 9/ applicable to underground mining, a rebuttable presumption arises that the permittee caused damage to surface structures

---

9/ The permanent performance standards, which are set forth at 30 CFR Subchapter K, establish "the minimum performance standards and design requirements to be adopted and implemented under a regulatory program for coal exploration and surface coal mining and reclamation operations." 30 CFR 810.1. The regulations further note that "[t]he State regulatory authority shall ensure that performance standards and design requirements at least as stringent as the standards in this subchapter are implemented and enforced under every State program." 30 CFR 810.4(b). The subsidence control provisions set forth in the text of this decision were published on Mar. 31, 1995, with an effective date of May 1, 1995. See 60 FR 16722, 16749 (Mar. 31, 1995). While these provisions were clearly not in effect during the actions conducted below, we have considered their effect since they would apply to any further actions which this Board might order.

"[i]f damage to any non-commercial building or occupied residential dwelling or structure related thereto occurs as a result of earth movement within an area determined by projecting a specified angle of draw from the outermost boundary of any underground mine workings to the surface of the land." 30 CFR 817.121(c)(4)(i). The standards further provide that this presumption may be rebutted by showing, inter alia, that "[t]he damage predated the mining in question [10/]; the damage was proximately caused by some other factor or factors and was not proximately caused by subsidence; or the damage occurred outside the surface area within which subsidence was actually caused by the mining in question." 30 CFR 817.121(4)(iv). Insofar as Moses Tennant's complaint is concerned, WVDEP found that not only was there minimal evidence of damages to his house, such damages as might exist with respect to the house and which were apparent insofar as the outbuilding was concerned, were not caused by mine subsidence. We noted above that, in order to succeed on appeal with respect to this issue, appellant must establish that these conclusions are arbitrary, capricious, or an abuse of discretion. Judged under this standard, appellant has clearly failed to carry his burden.

A precondition for invocation of the rebuttable presumption provided by 30 CFR 817.121(c)(4)(i) is the existence of damage to a non-commercial building or occupied residential dwelling or structure related thereto. As noted above, upon receipt of Moses Tennant's complaint alleging that mine subsidence had caused damage to his home and concrete block outbuilding, 11/ OSM issued a TDN to the State regulatory authority, at that time WVDOE. WVDOE responded that no enforcement action would be taken because it had concluded that the damage to the outbuilding was more likely due to the settling of the building on the unconsolidated alluvial sediments rather than the result of mine subsidence. 12/

OSM did not merely rely on the report submitted by WVDOE in deciding not to pursue the matter further. On the contrary, it sent a civil engineer, employed by the Eastern Support Center, OSM, to conduct an on-site analysis of the conditions present on Moses Tennant's property. His report, in all essentials, corroborated WVDOE's conclusions on the question of mine subsidence with respect to the outbuilding. Insofar as Tennant's assertion that mine subsidence had caused damage to his residence, the report noted that Tennant's house "shows no apparent structural damage, nor

---

10/ This is, in essence, the showing made by WVDEP with respect to Betty Tennant's allegations of hillside slippage.
11/ While appellant did list "possible damage to walk, garage floor [and] wall in house," among the items for which he sought recompense, there was no mention of possible damage to his house in the narrative portion of his complaint, which was directed to the asserted damage done to Moses Tennant's water supply and to his outbuilding.
12/ WVDOE did not address the question of whether or not there was any damage to appellant's house and, if so, whether this was related to mine subsidence.

does it exhibit signs of stress, that would have occurred if subsidence had occurred" (Report dated Feb. 13, 1992, at 4).

Before this Board, Tennant argues that both the WVDOE and OSM investigations were flawed since they failed to eliminate the possibility that mine subsidence was a causative or contributing factor to the damage which he asserts both his house and the outbuilding have suffered. In this regard, however, appellant misapprehends the showing required on appeal. It is demonstrably insufficient to merely show that the decision below might be wrong, i.e., it is possible that any damage which his property has suffered could be caused by mine subsidence. In order to prevail before the Board, appellant is required to show by a preponderance of the evidence that the decision below was in error, i.e., it is more likely than not that the damage which has occurred was the result of mine subsidence. See Estill Estep, 130 IBLA 291 (1994).

With respect to his house, appellant has simply failed to establish that any damage has occurred. While appellant takes strong exception to the conclusions reached by Morrison that the Tennant residence exhibits no signs of subsidence damage, 13/ he has submitted no evidence which contradicts these observations, which, we must note, are supported by the videotaped record of Morrison's examination. Appellant has simply failed to show the existence of any damage to his residence sufficient to even give rise to a presumption that subsidence had occurred.

There was, of course, no question that damage had occurred to appellant's outbuilding and that this structure was within the requisite angle of draw of underground workings. Thus, a rebuttable presumption could arise that the damage was caused by mine subsidence. Such a presumption, however, merely shifts the burden from appellant to affirmatively establish the fact that subsidence created the damage to the permittee to show, by a preponderance of the evidence, that the damage was not caused by subsidence. See, e.g., BLM v. Carlo, 133 IBLA 206, 210-11 (1995); Bernard S. Storper, 60 IBLA 67, 70 (1981), aff'd, Civil No. 82-0449 (D.D.C. Jan. 20, 1983). Herein, we believe the evidence of record which consists of both the Morrison report, as well as a soil report by the Soil Conservation Service of the U. S. Department of Agriculture, provides more than sufficient factual grounds on which to conclude that the rebuttable presumption had been overcome. 14/ Appellant has submitted nothing on appeal which

---

13/ Morrison's report noted that, though Tennant had asserted that the front wall in the living room was buckled and bowed, "When the walls were checked, no buckles could be found [and] the corners, where the paneling met the side walls, were found to meet neatly without separation" (Report of Feb. 13, 1992, at 4). Indeed, Morrison expressly found that "[t]here was no separation, tearing or buckling of any spackled and taped seams in the dry-wall construction of the house." Id. (Emphasis in original.)

14/ There is a letter to the file, dated Oct. 18, 1991, from a District Conservationist, Soil Conservation Service, to Tennant, in which he relates the results of his on-site investigation of his property. This letter

would justify a determination that the decision of the State regulatory authority not to take further action with respect to the damage to the outbuilding was arbitrary, capricious, or an abuse of discretion. Accordingly, we hereby affirm that part of the decision below which declined to take further action on appellant's assertions that mine subsidence had damaged his house and outbuilding. 15/

[4] The sole issue remaining relates to the presence of methane in Moses Tennant's water supply. As our recitation of the facts of this case makes clear, there is no dispute that there was methane contamination of appellant's water well which EACC had originally drilled to replace appellant's water supply. See generally Patricia A. Marsh, supra; Martha & Roy A. McBride, 129 IBLA 112 (1994). The record is equally clear that OSM determined that EACC was responsible for the methane in appellant's well. This is documented both in the January 9, 1991, letters from OSM to WVDOE and appellant, respectively, as well as the November 21, 1991, letter from OSM to appellant. 16/ We note that nothing in the record documents or

---

fn. 14 (continued)
concluded that the soils were Lobdell silt loam which had "severe limitations for dwelling because of flooding." He continued, however, that "[i]f adequate footers were constructed there is no apparent soil reason for the house to move and cracks appear in the walls." On appeal to this Board, Tennant relies on this last comment as supportive of his assertion that the outbuilding damage was caused by the settling of the structure on unconsolidated alluvial sediments. The problem, however, is that Morrison explicitly found that the footers for the outbuilding were "shallow and inadequate" (Report of Feb. 13, 1992, at 4).
15/ We also note that there is substantial question whether or not Moses Tennant has authority to proceed with any action before OSM relating to subsidence damage to his residence and outbuilding. The record is clear that Tennant filed a claim with his insurance company and received payment thereon in the amount of $7,793.22. Documents in the case file indicate that, in return for this payment, appellant subrogated the Insurance Company (Federal Kemper) "to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss" and further warranted that no "settlement will be made nor release given by the undersigned without the written consent of said Insurance Company." It is certainly open to question whether or not, in view of the subrogation of the Insurance Company to his claims, appellant has authority to proceed with the subsidence damage complaint herein. Cf. Patricia A. Marsh, 133 IBLA 372 (1995) (waiver of right of water replacement under State law bars citizen's complaint based on loss of water). However, inasmuch as we are denying the appeal on other grounds, we need not explore this matter further at the present time.
16/ This latter letter was, moreover, consistent with an earlier conversation which representatives of EACC had conducted with the Morgantown Office during which they were informed that, notwithstanding their assertion that EACC was not responsible for the methane contamination of Moses Tennant's well, it was OSM's continuing position that EACC was responsible. See Memorandum of Aug. 29, 1991, memorializing conversation of same date.

supports any OSM reconsideration of this conclusion. Indeed, the record indicates that WVDEP may have reached a similar conclusion since it had determined to require EACC to vent appellant's well. See Letter of Nov. 21, 1991, from OSM to appellant ("It is our understanding that DEP verified the presence of methane at you[r] new well and was prepared to require [EACC] to vent the well head"). In light of the foregoing, it seems clear to us that OSM's subsequent determination not to address the problem of the presence of methane in appellant's water supply in his home can simply not stand.

The Ehler report prepared for the Eastern Support Center makes it absolutely clear that the source of the methane in appellant's water supply was methane contamination at the well head. See Ehler Report at 1 ("The methane occurs in [Tennant's] water well"). The report also noted that the "amount of combustible gas that is dissolved in the well water is significant and * * * [d]angerous levels of combustible gas could potentially exist in appliances such as a dishwasher or clothes washer" (Ehler Report at 3). The report concluded that an aeration system to treat the well water would reduce or eliminate the problem.

It seems to us almost tautological that, to the extent that OSM had determined that EACC was responsible for the methane at the well head and was properly required to vent the well, EACC must necessarily be responsible for the methane dissolved in the water, itself, and equally responsible for the installation of an aeration system to eliminate the danger which the levels of methane in the water posed. OSM's refusal to direct corrective action in this regard can simply not be justified on the present record. Accordingly, we hereby set aside the determination of OSM that no further action could be taken with respect to the presence of methane in the water and remand this issue to OSM for further consideration consistent with the foregoing analysis.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed with respect to Betty L. Tennant's appeal (IBLA 92-437), affirmed with respect to so much of Moses Tennant's appeal (IBLA 92-509) which related to subsidence damage to his residence and related structures, and set aside and remanded insofar as the appeal challenged the failure of OSM to take further action with respect to contamination of his water supply by methane gas.

_____
James L. Burski
Administrative Judge

I concur:

_____
Gail M. Frazier
Administrative Judge